Nos. 540 and 573

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY GRAY NUGENT

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes and Regulations:

Statutes and Regulations—Continued

Miscellaneous—Continued

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OPINIONS BELOW

The opinion of the Court of Appeals in *United States* v. *Nugent*, No. 540 (R. 57-63), is reported at 200 F. 2d 46. The opinion of the Court of Appeals

in *United States* v. *Packer*, No. 573 (R. 49-51) is reported at 200 F. 2d 540.

JURISDICTION

The judgment of the Court of Appeals in No. 540 was entered on November 10, 1952 (R. 63). On December 5, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari until January 9, 1953 (R. 64), and a petition was filed on that date. The judgment of the Court of Appeals in No. 573 was entered on December 31, 1952, and a petition for a writ of certiorari was filed on January 29, 1953. This Court granted the petitions in both cases on March 16, 1953 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he

has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

STATUTE AND REGULATIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613) provides:[1]

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemp-

[1] As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U.S.C. App., Supp. V, 456(j)), Section 6(j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial. See note 4, p. 8, *infra*.

tion from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

The Selective Service Regulations, 32 C.F.R. (1949 ed.), Part 1626.25, provide:

> (c) The Department of Justice shall * * * make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.
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> (d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

STATEMENT

Respondents were both convicted of violating Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U. S. C. App., Supp. V, 462) by willfully failing to take the symbolic "one step forward" that would have completed their respective inductions into the armed forces of the United States [R. (No. 540) 55; R. (No. 573) 32].[2] On appeal, the Court of Appeals for the Second Circuit reversed the judgments of conviction [R. (No. 540) 57-63; R. (No. 573) 49-51], holding that the induction orders were not based upon valid classifications. In both cases, the invalidity of the classifications was predicated upon the fact that confidential F. B. I. reports of investigations of respondents' claims to exemption as conscientious objectors had not been made available to them at or before the Department of Justice hearing which is required by the Selective Service Act of 1948 (Section 6(j), *supra*, pp. 3-4) in connection with appeals from adverse classifications by the local board. In neither case had disclosure of the investigative reports been requested by the registrant before or at the hearing,[3] nor was there any show-

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[2] The indictment against respondent Nugent was returned on February 29, 1952, in the United States District Court for the Southern District of New York (R. 1-2). Respondent Packer was indicted in the same court on November 19, 1951 (R. 1-2). Respondents both waived jury trial [R. (No. 540) 2; R. (No. 573) 10].

[3] Respondent Packer, at the criminal trial, moved pursuant to Rule 17(c), F. R. Crim. P., for production and inspection of the F.B.I. reports and caused a subpoena duces tecum to be served on the New York office of the F.B.I. (R. 4-5). The court denied the motion for inspection (R. 9) and granted the Government's motion to quash the subpoena (R. 10).

ing that derogatory information was developed in either investigation which contributed in any way to the ultimate classifications.

Nugent. The events leading up to respondent Nugent's classification and attempted induction are as follows:

Nugent registered with his local board during September 1948. On February 2, 1949, he executed his classification questionnaire, indicating therein that he was "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form" (R. 4, 30-31), and asserting further that, because of religious beliefs, he would serve only as a noncombatant (R. 4, 31). Nine months later, on October 10, 1950, the local board received his completed Selective Service System Form 150, a special form wherein conscientious objectors may set out the basis and reasons for their conscientious objection (R. 4, 32-38). In this form, Nugent indicated that he was conscientiously opposed to participation in war in any form, including noncombatant training and service. Along with this form, he submitted evidence in support of his claim to exemption, including a resolution of the Bible Students General Convention, verified October 9, 1950, stating its opposition to participation in war (R. 38-39); a letter written to the local board further detailing the grounds of his conscientious objection (R. 39-40); and a resolution of the Associated Bible Students, dated November 14,

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These rulings have no bearing on the question of the availability of the investigative reports at the administrative hearing.

1948 (R. 41-42). On the basis of his original questionnaire and the special form for conscientious objectors, together with the appended matter, the local board, on October 25, 1950, classified him I-A, available for military service (R. 4-5). He was duly notified of this classification (R. 5).

On November 4, 1950, Nugent wrote to the local board requesting a personal hearing (R. 5). The request was granted, and on February 1, 1951, a hearing was held. At the conclusion of this hearing, he was classified 1-A-O, a noncombatant classification for conscientious objectors (R. 6),[4] and on February 5, 1951, notification of the new classification was mailed to him.

Within ten days of the mailing of this notification, Nugent notified the board that he desired to appeal from his 1-A-O classification, although that was the classification he had originally sought (R. 6). The appeal board, having determined that Nugent should not be classified 4-E, as he contends, directed that his file be transmitted to the United States Attorney for the Eastern District of New York for the purpose of securing an advisory recommendation from the Department of Justice in accordance with the requirements of the

[4] Section 6(j) of the Selective Service Act of 1948 *(supra,* pp. 3-4) provided that persons claiming exemption as conscientious objectors could either be ordered to perform noncombatant military service (the type for which the present respondent was classified) or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951 (supra, note 1, p. 3), Section 6(j) no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest * * *."

Selective Service Act and the regulations issued under the Act, *supra*, pp. 3-5 (R. 7).

The Department of Justice conducted an inquiry through the Federal Bureau of Investigation and referred the case to a Department of Justice hearing officer. Respondent Nugent was notified to appear before the hearing officer at a hearing to be held on July 26, 1951 (R. 9). With his notice, he received a set of instructions from the office of the Attorney General informing him *inter alia* of his right upon request to be advised "as to the general nature and character of any evidence * * * which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence" (R. 9, 54). At no time did Nugent make any such request.[5]

At the hearing, he was given an opportunity again to state the grounds of his conscientious objection. He appeared for himself, and did not present any witnesses on his own behalf. The hearing officer in his report observed that the registrant's religion appeared a "free and particularly easy belief * * * calling for little effort * * *," that his references had not made a favorable impression as to his sincerity, and that the registrant had not qualified as a conscientious objector by vir-

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[5] At the trial, respondent testified that he had gone to the office of the hearing officer in order to ascertain whether there was anything unfavorable in the F.B.I. files, and upon being informed by the hearing officer's secretary that the files were favorable, made no further efforts to prepare for the hearing (R. 10-11).

tue of either church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency. In making these observations, the hearing officer made no reference to information supplied by the F. B. I. Although concluding that Nugent should be classified 1-A, the hearing officer acceded to the ruling of the local board and recommended a 1-A-O classification. (R. 46-47.)

The hearing officer's report, with the complete service file and the F.B.I. investigatory report, was forwarded to the special assistant to the Attorney General in charge of these matters. After a review of the entire file and records, the Department of Justice on January 24, 1952, recommended to the appeal board that Nugent's claim to exemption from military service should be sustained as to combatant service only. (R. 47-48.)

The appeal board, having before it the complete selective service file, including the hearing officer's report and the recommendation of the Department of Justice, voted on February 4, 1952, to continue Nugent in class 1-A-O (R. 7-8). Thereafter, he was notified to report for induction on February 21, 1952 (R. 8). This he did, but, as indicated above, refused to complete the induction process.

Packer. The events leading to respondent Packer's trial and conviction are as follows:

Packer registered with his local board during September 1948. On July 19, 1949, he was mailed his Selective Service Questionnaire, which was completed and returned to the board (R. 14, 52,

Gov. Ex. 2A). In executing this form, Packer failed to sign Series XIV, a portion of the form designed to give registrants an opportunity to assert their conscientious opposition to war (R. 58). On September 20, 1949, the local board classified him 1-A, and on October 20, 1949, he was notified of the board's action and of his rights to hearing and appeal (R. 14). Approximately one year later, on October 4, 1950, Packer was sent a certificate of acceptability, indicating that he had been found acceptable for induction into the armed services (R. 15).

Thereafter, on October 20, 1950, more than two years after his original registration, he made his first request for the special form for conscientious objectors (SSS Form 150) (R. 15). This form was completed and returned to the local board on October 31, 1950 (R. 15).

In asserting his claim to exemption as a conscientious objector, Packer stated that his religious guidance came solely from the dictates of his conscience, that he had never given public expression to his claim, either oral or written, and that he was not a member of a religious sect or any other organization. In a statement appended to the form, he stated that he believed in a Supreme Being but did not know whether his code of morals would be considered religious, that in his early years he had received religious training which probably affected his subconscious mind, that his belief could best be stated in the words of an "immortal Chinese philosopher" who said, "Human nature is good * * *

the sense of right and wrong [moral consciousness] is found in all men,' and that it was his own highly developed moral consciousness that made the slaughter and destruction of war repugnant to him. (R. 64-68.)

On November 2, 1950, the clerk of the local board notified Packer that the board, after reviewing his case, had decided that the facts submitted did not warrant a reopening of his classification (R. 15-16). On November 7, 1950, he made a request for a hearing (R. 16), which on November 16, 1950, was denied by the local board (R. 16). On the following day, he was sent an order to report for induction on December 6, 1950 (R. 16-17). Before that date, however, the New York Selective Service System Headquarters advised the local board to cancel this order so that Packer could make the appeal customarily granted to persons claiming conscientious objection (R. 17-18). Accordingly, Packer's file was sent to the appeal board which, after determining that he was not entitled to classification as a conscientious objector, forwarded the file to the Department of Justice for inquiry and hearing (R. 18).

Respondent Packer, upon being notified that a hearing would be held on May 7, 1951, wrote to the hearing officer requesting notification as to the nature of any evidence "which is unfavorable and tends to defeat my claim for exemption" but did not ask to be shown the Department's F.B.I. report itself (R. 19). In reply to this request, the hearing officer informed Packer that no unfavor-

able information had been received other than the facts apparent from his file, *i.e.*, that he had not claimed conscientious objection in his original questionnaire and that he had stated that he was not a member of a religious sect or organization (R: 19; Def.'s Ex. A, R. 43).

At the hearing, it was brought out that Packer had received religious training in the Hebrew faith from the age of 8 or 9 to 13, but that thereafter he had discontinued attendance at religious services; that his belief in nonviolence did not stem from the teachings of any particular person or book but was something that had slowly developed within him, stimulated perhaps by the destruction of World War II and his early religious training; that he had not originally registered as a conscientious objector because he did not know whether he could pass his physical examination and did not wish to look for trouble in advance. He again was informed that there was nothing derogatory in the F.B.I. report. (Def.'s Ex. B. R. 43-46.)

In his report, the hearing officer after summarizing the facts contained in Packer's special form for conscientious objectors and those brought out in the hearing, concluded that this respondent had failed to establish that his opposition to war arose from religious training and belief (Gov. Ex. 2P, R: 40-42). On July 24, 1951, the Department of Justice, in a letter to the appeal board, recommended that Packer should not be classified as a conscientious objector for the reason given by the hearing officer, namely, that his convictions did not

result from religious training and belief but were based upon "philosophical * * * grounds or upon a personal moral code" (Gov. Ex. 2Q, R. 75).

Subsequently, on August 20, 1951, the Selective Service appeal board voted 4-0 to classify Packer 1-A (R. 20), and on August 24, 1951, notice of this action was sent to him (R. 21). On August 30, 1951, he was sent an order to report for induction on September 14, 1951 (R. 21). On August 30 and August 31, respectively, Packer wrote to General Hershey, Director of the Selective Service System, and to the New York City Director of Selective Service, Colonel Cobb, asking that his case be restudied (R. 21). On September 6, 1951, the local board informed him that no further action would be taken pursuant to his letter of August 30, and that he should report for induction on September 14, as scheduled (R. 21). On the same date, a letter from Colonel Cobb also informed him that the 1-A classification would stand (R. 21). However, a letter from the Chief of the Manpower Division of Selective Service in Washington to Colonel Cobb requested that Packer's cover sheet be sent to Washington for review (R. 22). As a result of this further review, induction was postponed until October 16, 1951 (R. 22). After reviewing the file, national Selective Service headquarters concluded that there was "no need for further action * * * in order to prevent injustice" (*ibid.*). On October 9, 1951, the local board wrote to Packer reminding him that he was to report for induction on October 16, 1951 (R. 23).

He reported for induction on that date, but was held over until November 5, 1951, so that his physical qualifications could be checked further (R. 23). On November 5, 1951, Packer executed and signed a statement which reads: "I refuse to be inducted in the armed forces of the United States" (R. 23).

SUMMARY OF ARGUMENT

Section 6(j) of the Selective Service Act of 1948 provides that a registrant whose claim for exemption from military service as a conscientious objector has been denied by his local board may appeal to the appropriate appeal board. It further provides that the appeal board shall refer the claim to the Department of Justice which, "after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." Section 6(j) specifically provides that "the appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

The court below has held that the respondents' claims for exemption as conscientious objectors were denied improperly in that in each case the investigatory report of the Federal Bureau of Investigation was not disclosed to the registrant at or before the hearing before the Department of Justice hearing officer or to the appeal board, to which the Department made its recommendation.

In so holding, and in holding that the registrant's right to be informed of the substance of any information in the report adverse to his claim does not satisfy the Act's requirement of a hearing, the court below has mistaken the nature and purpose of the "inquiry and hearing" which Congress intended the Department of Justice to conduct.

I

In ascertaining the kind of procedure Congress intended by requiring an inquiry and hearing into claims for exemption from military service on the ground of conscientious objections, regard should be had for the nature of the interests involved and the governmental action to be taken, the history of the problem and its treatment, the reasons for employing a particular type of procedure, and the disadvantages of alternative procedures. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 308, 317; *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 276-277. It is significant that exemption from military service on conscientious objector ground is a privilege, not a constitutional right, and is so regarded by Congress. *United States* v. *Macintosh*, 283 U. S. 605. Thus, Congress was not required to provide any kind of an appeal procedure. Moreover, since the inquiry and hearing held by the Department results only in a recommendation to the Selective Service appeal board, it must be assumed that Congress did not intend to require a trial or adversary type of hearing which might be appropriate if the Department's decision were conclusive rather than ad-

visory. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 318-319. That Congress intended the Department to conduct an investigation rather than a trial is confirmed by the fact that the inquiry and hearing required by Section 6(j) is an integral part of a selective service system which is characterized by summary and informal procedures, and by the fact that Congress has continually excepted selective service functions, including those under Section 6(j), from the formal procedural requirements of the Administrative Procedure Act.

A. American experience with claims for exemption from military service of conscientious objectors really begins with World War I, when the Secretary of War appointed a board of inquiry, which included Dean (later Chief Justice) Stone and Judge Mack to determine upon the basis of personal interviews the sincerity of conscientious objector claims. The legislative history of the Selective Training and Service Act of 1940, in which the inquiry and hearing provisions first appeared, indicates only that the peace churches and others interested in the problem, were primarily concerned to obtain a consideration of conscientious objector claims by some wholly civilian authority. As the provisions for an "inquiry and hearing" by the Department of Justice were evolved, there was no suggestion that the Department was expected to follow a procedure vastly different from the methods used by the 1917 board of inquiry.

B. By the time the inquiry and hearing provi-

sions were reenacted as Section 6(j) of the 1948 Act, the Department of Justice had made recommendations on thousands of conscientious objector claims without disclosing the F.B.I. investigatory reports or the identity of informants to the registrants. While it does not appear whether Congress was aware of the details of the Department's inquiry and hearing procedure, it was well-known to conscientious objectors and to the churches and other organizations. The reenactment without change of the inquiry and hearing provisions in 1948 and 1951 can only mean that interested persons and groups and presumably Congress itself were satisfied with the procedure consistently followed by the Department in thousands of cases since 1940.

C. The purpose of the inquiry and hearing is to ascertain so far as possible whether a registrant's religious development and daily life support his claim for exemption as a conscientious objector which has already been denied by selective service authorities. Such information is largely available only from persons close to the registrant. The statements and opinions of such persons, when furnished to the hearing officer in the investigatory report, provide him with essential leads for questioning the registrant and his witnesses at the hearing. Since the registrant, at his request, is furnished with a statement of the general character of any information in the report adverse to his claim, he is enabled to protect himself against mistaken or malicious statements. Such disclosure to

the registrant, without divulging the names of informants, will rarely, if ever, be inadequate to enable him to rebut or explain such information, because the matters involved are peculiarly within his knowledge and that of persons available to him as witnesses.

On the other hand, it is undisputed that information of this kind, which can be obtained from persons close to the registrant, is in large part unavailable unless the sources of such information are assured that their identities will not be disclosed. The non-disclosure of the identity of informants in this situation is thus justified on the same grounds as this Court, in *Williams* v. *New York*, 337 U. S. 241, recognized as precluding the disclosure of the sources of information contained in a pre-sentence investigation report where the death penalty was involved.

Since the inquiry and hearing procedure followed by the Department provides each registrant with a full opportunity to establish the sincerity of his claim, there is no basis for concluding that Congress desires another procedure to be used which will deprive the Department of much of the information necessary to the proper evaluation of such claims.

II

While the court below did not determine whether due process of law requires disclosure to registrants of the F.B.I. investigatory report and the names of informants, it is clear that such disclosure is not required by due process.

Since exemption from military service is a privilege, Congress is free to provide a type of appeal or review procedure, if any, which it considers appropriate for determining claims for exemption. *Knauff* v. *Shaughnessy*, 338 U. S. 537. The fact that the inquiry and hearing by the Department of Justice under Section 6(j) results only in a *recommendation* to the appeal board strongly suggests that due process requirements do not apply to such a hearing so as to require disclosure of the names of informants.

In any event, the Department's hearing procedure accords registrants a full and fair opportunity to establish their claims, including an opportunity to know the general character of any information in the investigatory reports which is adverse to their claims. The further disclosure to registrants of the identity of the sources of essential information, thereby making much of such information unavailable, is not required by due process. *Williams* v. *New York*, 337 U.S. 241.

ARGUMENT

In the instant cases, the court below has held that reports of investigations made by the Federal Bureau of Investigation prior to the hearing held by the Department of Justice pursuant to Section 6(j) of the Selective Service Act of 1948 (*supra*, pp. 3-4) must be made available to the registrant before or at such hearing. The court specifically held that advising the registrant of "the general nature and character of any evidence * * *

unfavorable" to his claim would not suffice, and that the investigatory report, icluding the names of persons interviewed by the F.B.I., must be disclosed to the registrant "to put him in a position to interrogate or impeach the witnesses who gave such testimony" (R. (No. 540) 62). Under the decision below, it is immaterial whether the registrant has requested that such reports be disclosed to him or that he be advised of the general character of any adverse information contained in them, and no showing of actual prejudice to the respondents because of the non-disclosure of the reports was required.

The court below concluded, solely as a matter of statutory construction, (1) that the hearing required by Section 6(j) would be pointless unless it "was to give the registrant opportunity to meet the contents of the report"; and (2) that Section 6(j) in making the Department's recommendation advisory rather than binding upon the appeal board, thereby calls for evaluation by the appeal board of the worth of the Department's recommendation, "a task impossible of fulfillment unless the board has access to the entire record on which the recommendation is based." In addition, the court below takes the position that while the hearing is not a criminal trial, "its effects on defendant might be fully as important," and, therefore, the registrant is entitled to an opportunity not only to refute the information against him, but also to interrogate and impeach the sources of such information.

We contend that the decision below is erroneous in that it overlooks the nature of the inquiry and hearing conducted by the Department of Justice in conscientious objector cases as one step in the process of maintaining the armed forces, the historically informal procedure for determining such matters, the legislative history of Section 6(j) and identical predecessor provisions, the long-standing and widely known administrative construction of such statutory provisions as authorizing the procedure challenged here, and the repeated reenactment of these provisions without objection to such procedures.

The Procedural Background

The provision of Section 6(j) for an "inquiry" and "hearing" by the Department of Justice in appeals of registrants claiming exemption from military service as conscientious objectors, must be read as part of a broad and basic statute for manning the armed forces of the United States. The Selective Service Act of 1948, like its predecessor and successor statutes was enacted when "Congress deemed it imperative to secure a vast citizen army with the utmost expedition". *Estep* v. *United States*, 327 U.S. 114, 137 (concurring opinion of Mr. Justice Frankfurter). All of our selective service statutes, from 1917 down to date, have provided summary and informal administrative procedures within the selective service system to determine who shall be required to serve in the armed forces and who shall be exempted upon one

of the grounds specified by Congress. At all times, the case-to-case application of the induction requirements has been placed primarily in the hands of local boards and appeal boards composed largely of non-lawyers. These boards, operating without investigating facilities, have employed classification procedures in the nature of informal hearings or conferences with registrants, rather than formal trial type hearings. The burden of proof is always upon the registrant to establish his claim of exemption from the common obligation of military service. Formality is limited to the preservation of records sufficient to enable appeal boards to review what the local boards have done and to enable courts to ascertain whether the selective service authorities have complied with the command of Congress.

It is in this setting that Congress first provided in Section 5(g) of the Selective Training and Service Act of 1940 (54 Stat. 885, 889) that:

> * * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency a hearing shall be held by the Department of Justice with respect to the character and good faith of the ob-

jections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision.

Before a conscientious objector case is referred to the Department of Justice, the registrant has presented his claim to his local board. From the local board's denial of his claim, he may appeal to an appeal board. Until 1952 and in the disposition of the present cases, such cases were not referred to the Department of Justice unless the appeal board also made a determination adverse to the registrant. At the present time, however, when a case is taken to the appeal board, the board refers it to the Department and the board makes no deter-

mination until it has received the Department's recommendation.

From the beginning, commencing with the formulation in 1941 of *Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed,* the Department of Justice interpreted Section 5(g) of the 1940 Act, which is now Section 6(j) of the 1948 Act, as providing an opportunity for a hearing officer to discuss personally with the registrant and his witnesses the claim of exemption and to appraise their sincerity, rather than a trial involving the testing of witnesses discovered in the course of the F.B.I. investigation.

The hearings have been conducted by hearing officers designated in central locations by the Attorney General. They have served without compensation except for an expense allowance for necessary travel. At the present time, there are approximately 175 such hearing officers, all of whom are lawyers of high standing before their bars and in their communities. Prior to the hearing, the hearing officer is furnished with the report of an F.B.I. investigation into "the character and good faith of the objections of the person concerned." The report will include information obtained by interviews with friends, clergymen, neighbors and others who are in a position to furnish information bearing upon the sincerity of the registrant's assertion of conscientious objections. Thereafter, the hearing officer sends to the registrant a standard form of written notice of the time and place of

the hearing. With this notice, the registrant is furnished a copy of the *Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed*, which from February 1941 to the present time have read as follows:

> Pursuant to the provisions of section 5(g) of the Selective Training and Service Act of 1940 and paragraph 375, Section XXVII, Volume Three of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war in any form has been denied (or granted) by a local board and an appeal has been taken to an appeal board.
>
> 1. In each instance, the hearing will be conducted by a duly designated "hearing officer", and the registrant will be duly notified by the hearing officer of the place and time fixed for the hearing on his claim.
>
> 2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, [6] the hearing officer will advise the regis-

[6] In 1942, the Instructions were amended to provide that such information would be furnished to registrants only at the hearing. Thereafter, the practice was followed of granting continuances to registrants needing time to rebut such information. The Instructions as reissued in 1948, as furnished to respondents Nugent and Packer, and as presently in force, read as set forth above.

trant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

3. At the hearing by the hearing officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war in any form.

4. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious training and belief and the character and good faith of his objections to participation in war in any form. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim. If the registrant is unable to appear personally at the hearing, he may mail all such statements, documents, etc., to the hearing officer at his address given in the notice of hearing.

5. The hearing will not be in the nature of

a trial or judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated hearing officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

6. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the hearing officer may, in his discretion, have such record made.

It is in the context of an informal procedure as described in the *Instructions* that the policy of the Department of Justice not to disclose the F.B.I. investigatory reports to registrants must be appraised. Neither the Department nor its hearing officers regard the proceeding as a trial or contest. The government is not represented by a prosecutor. The hearing examiner has no subpena powers. The purpose of both the investigation and the hearing is to obtain whatever information will assist the hearing officer in evaluating the sincerity of the registrant's claim. On the one hand, the regis-

trant is encouraged to present information supporting his claim without regard to the rules of evidence. On the other hand, the report of the F.B.I. investigation makes available to the hearing officer information and opinions, both favorable and unfavorable to the registrant, from persons who are unwilling to have their names disclosed for purposes of impeachment and cross-examination. At the registrant's request, he is informed by the hearing officer of "the general nature and character of any evidence in [the hearing officer's] possession which is unfavorable to, and tends to defeat, the claim of the registrant." Since the registrant knows better than anyone else the development of his convictions and their manifestation in his daily life, and in view of his unrestricted opportunity to present his case to the hearing officer, we submit that the disclosure thus available to him constitutes a genuine and adequate protection against mistaken or malicious statements which may be made against him in the course of the F.B.I. investigation.

It is worth emphasizing, moreover, that the report of the F.B.I. investigation is not the sole and often not the most important basis for the hearing officer's decision. The demeanor of the registrant and his witnesses, coupled with the information furnished by the registrant himself, is decisive in many cases. In other cases, however, the F.B.I. report, including as it does information and opinions which would not be available if the names of

sources were disclosed, furnishes the hearing officer with crucial leads for questioning the registrant and his witnesses.

After the hearing, the hearing officer prepares findings of fact, usually in the form of a narrative statement, and a recommendation which he sends to the Department of Justice. There, the registrant's selective service file, the report of the F.B.I. investigation, and the hearing officers' recommendation are reviewed by a Special Assistant to the Attorney General who is assisted by other attorneys. After such a review, the Department's recommendation is prepared over the signature of the Special Assistant, and forwarded to the Selective Service appeal board from which the case originated. It is estimated that the Department concurs with the recommendation of the hearing officer in at least 95% of the cases.

Until June 1952, and in both of the instant cases, the Department's recommendation to the appeal board was accompanied by a copy of the hearing officer's recommendation. Under a 1952 change in the Selective Service Regulations (17 F. R. 5451, June 18, 1952), the hearing officer's report is no longer transmitted with the Department's recommendation, which has been expanded to incorporate the factual findings formerly contained in the hearing officer's report. The report of the F.B.I. investigation is not furnished to the appeal board.

Section 6(j) of the 1948 Act, like the corresponding provisions in the 1940 and 1951 Acts, specifically provides that "The appeal board shall, in making its decision, give consideration to, but shall

not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." While Congress has thus limited the Department of Justice to an investigatory and advisory role, and retained the power of decision within the Selective Service System, it is clear that the procedures of inquiry and hearing followed by the Department have been of great benefit to conscientious objectors. During the five and a half year period ending June 30, 1946, out of 2,134 cases of registrants appealing from denials of their claims of exemption from combatant training and service, the Department recommended that 64.6 percent be granted the claimed exemption. In 7,003 cases involving appeals from denials of claims of conscientious objection to both combatant and noncombatant service, the Department recommended complete exemption for 49.2 percent and exemption from combatant service for 13.9 percent. During that period, appeal boards followed the recommendations of the Department of Justice in more than 75% of the cases. Observing "that almost all of these registrants had their claims denied previously by one or two classification agencies of the System," a monograph of the Selective Service System records the inescapable conclusion that "the general effect of the consideration given by the Department of Justice to objector cases was to recommend that Selective Service appeal ~~and local boards~~ be more liberal in granting the claims of such registrants."[7]

[7] Selective Service System Monograph No. 11, "Conscientious Objection" (1950), Vol. I, pp. 145-147.

I

Section 6(j) of the Selective Service Act of 1948, in Providing for Inquiry and Hearing by the Department of Justice, Does Not Require a Trial Type of Hearing in Which Reports of F. B. I. Investigations, Including the Identity of Informants, Must Be Disclosed to the Registrant

Section 6(j) provides that when an appeal board refers a claim to the Department "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." On its face, the Act does not specify the nature of the inquiry and hearing to be held, and it gives no clue as to whether Congress intended that the report of the F. B. I. investigation, including the names of persons furnishing information to the F. B. I., must be disclosed to the registrant. The court below, looking only to the words of the statute, concluded that the purpose of the hearing was to enable the registrant to meet the results of the Department's inquiry, and that the report of the F. B. I. investigation must be disclosed to enable the registrant "to interrogate or impeach the witnesses who gave such testimony" and to enable the Selective Service appeal board to "evaluate the worth" of the Department's recommendation (R. 61-62, No. 540).

We contend, to the contrary, that "The answer will not be found in definitions of a hearing lifted from their setting and then applied to new condi-

tions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy and practice as well as to the dictionary." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 317.[8] Even where the claim has been made that a particular type of procedure was required by due process of law, this Court has upheld "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind" and stated that the problem is "one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them." *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 276-277. Or, as Mr. Justice Frankfurter put it, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163,

> The Court has responded to the infinite variety and perplexity of the tasks of government by

[8] In the same case, this Court stated that (288 U.S. at 308):

> Our discussion of the significance of history as an aid to the construction of the statute will be inadequate if it is confined to the history of hearings by congressional committees and to the amendments of the bill in its progress through the Houses. There is need to consider also the history of this Commission before the Act of 1922, and that of earlier commissions organized for kindred purposes.

> recognizing that what is unfair in one situation may be fair in another * * * The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

See also Davis, *Administrative Law* (1951) section 78.

Before turning to the legislative history of Section 6(j) and the history of the treatment of conscientious objectors in this country, certain legal characteristics of the inquiry and hearing conducted by the Department of Justice should be emphasized.

First, there is no constitutional right to exemption as a conscientious objector. "The privilege of the * * * conscientious objector to avoid bearing arms comes not from the constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; * * *". *United States* v. *Macintosh*, 283 U. S. 605, 624. The present exemption was regarded as a privilege by the framers of the 1948 Act (S. Rep. 1268, 80th Cong., 2d Sess., p. 14), and the Sixth Circuit in *Imboden* v. *United States*, 194 F. 2d 508, certiorari denied, 343 U. S. 957, took this

into account in holding that due process was satisfied even though the identity of informants was withheld.

Thus, Congress was free to leave claims for exemption because of conscientious objections entirely to determination under the summary and informal procedures of Selective Service local and appeal boards by which claims for exemption on other grounds are decided. *Ex Parte Stanziale*, 138 F. 2d 312, 314 (C. A. 3); *United States* v. *Pitt*, 144 F. 2d 169 (C. A. 3); *Petersen* v. *United States*, 173 F. 2d 111, 115 (C. A. 6); *Niznik* v. *United States*, 173 F. 2d 328, 336 (C. A. 6). It was under no constitutional compulsion to provide a formal trial type of hearing, and, particularly not for an inquiry or hearing by the Department of Justice or anyone else outside the Selective Service system. Moreover, since registrants have no constitutional right to an appeal, *District of Columbia* v. *Clawans*, 300 U. S. 617, 627, they clearly have no constitutional right to an appeal which includes an inquiry and hearing by the Department of Justice.

Second, Congress has not empowered the Department of Justice to decide whether a registrant's claim of exemption should be granted. Rather, the Department of Justice makes a *recommendation* which the appeal board is free to accept or reject, as the board must make an independent decision. In *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, this Court was confronted with the claim that under the provision

of the Tariff Act that the Tariff Commission should "give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," the Commission acted illegally in basing its recommendation to the President that he increase a tariff party upon data which was not disclosed to an objecting importer. In rejecting this contention the Court pointed out (288 U. S. at 318-319) that

> Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. * * * It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. * * * The "hearing" that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. * * *
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> The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone. They impel

> us to the holding that within the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. There was no thought to revolutionize the practice of investigating bodies generally and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same.

See also, *C. & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *McGrath* v. *Kristensen*, 340 U.S. 162, 167-168. Here, as in the *Norwegian Nitrogen* case, the function of the Department of Justice is to investigate and advise. Unless there is evidence of a contrary Congressional purpose, it must be assumed that Congress did not intend that a "hearing," which results only in a recommendation, must include a disclosure of investigatory reports and sources to registrants and appeal boards, by analogy to criminal trials. As we will point out, the evidence is clear that by providing for a "hearing" Congress did not intend to require a trial but rather made mandatory an investigatory type of hearing which has its roots in the methods applied to this problem during World War I.

Third, as we have pointed out above, it would be anomalous if by Section 6(j) Congress intended to inject a proceeding which might call for a full-scale trial into the context of the summary and ex-

peditious procedures which characterize every other phase of the administration of the Act.

Fourth, in Section 2(a) of the Administrative Procedure Act, Congress has exempted from all of the provisions of that Act (except Section 3) "the functions conferred by the * * * Selective Training and Service Act of 1940." Section 13 of the Selective Service Act of 1948 provides that "All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act * * * except as to the requirements of section 3 of such Act."[9] Clearly, this continuous exemption of Selective Service procedures from the Administrative Procedure Act reflects the view of Congress that the essentially adversary trial procedures of Sections 5, 7 and 8 of that Act have no place in the raising of armies.

A. *The legislative background of Section 6(j) shows that Congress did not contemplate a trial but rather an informal inquiry with a right to a personal appearance before a civilian agency outside the selective service system.*

1. *The Background—Treatment of Conscientious Objectors During World War I.*—While provision for inquiry, hearing and recommendation by the Department of Justice in conscientious objector cases was not included in the American system of selective service until the 1940 Act, its purpose and function are illuminated by the procedures

[9] This provision was continued in the Universal Military Training and Service Act of 1951. 65 Stat. 75.

developed for the handling of conscientious objector cases during World War I, a background with which those who were responsible for formulating the later statute were undoubtedly familiar.

Section 4 of the 1917 Act, 40 Stat. 76, provided that persons found to be members of a well-recognized religious sect whose existing creed forbade its members to participate in war in any form, and whose religious convictions were against war, should be exempt from combatant service. There was, however, no exemption from all military service, and in World War I conscientious objectors fell within the authority of the armed forces "[f]rom and after the day and hour" specified by the local board for reporting to the board for military duty. United States War Department, Selective Service Regulations, § 159D, p. 138, G. P. O., 1918. While the army made special arrangements for treatment of this group, there were nevertheless about 500 court-martial convictions for refusal by conscientious objectors to obey orders, and dissatisfaction with the system was widespread.

In December, 1917, the first of three important ameliorative measures was introduced in the form of an order by the Adjutant General of the Army extending the exemption from combat service to all persons claiming scruples against participation in warfare, irrespective of church affiliations. See United States War Department, *Statement Concerning the Treatment of Conscientious Objectors in the Army* (G. P. O. 1919), p. 37. The second

significant change occurred in June, 1918, when the Adjutant General made provision for farm and industrial furloughs for conscientious objectors opposed to noncombatant service.[10] At the same time, the Secretary of War created a board of inquiry consisting of a representative of the Judge Advocates Office, Dean (later Chief Justice) Stone, and Judge Mack, United States Circuit Judge. The board's function, which was to determine the sincerity of men professing objection either to combatant or to noncombatant service (*ibid.*, p. 21), had become imperative with the extension of exemption to non-peace-church members and the availability of furloughs to those opposed even to noncombatant military service.

This function was satisfactorily performed by the board. By means of personal interviews and interrogation, it examined nearly all conscientious objectors in the army, including persons theretofore convicted by courts-martial, and classified those found to be sincere for agricultural furlough or noncombatant service depending on their beliefs. Of 2294 claimants, 1978 were found to be sincere either as to combatant or noncombatant service. Clemency was recommended in 113 cases where the claimant had previously been convicted by court-martial. *Ibid.*, at pp. 24, 31. See generally, H. F. Stone, *The Conscientious Objector,*

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[10] An Act of Congress on March 16, 1918, had authorized the Secretary of War to grant furloughs to enlisted men without pay and allowances. 40 Stat. 450.

21 Columbia University Quarterly 253 (1919) No. 4; Mason, *Harlan Fiske Stone: In Defense of Individual Freedom, 1918-20*, 51 Col. L. R. 147 (1951).

Thus, the World War I experience taught (1) that provision for conscientious objectors, to be adequate must go beyond granting limited exemption to members of the historic peace churches, (2) that degrees of objection should be recognized, at least to the extent that some provision ought to be made for those opposed to noncombatant military service, and (3) that personal interviews and interrogation by an experienced board possessing some degree of expertise proved a fair and effective method of testing sincerity and making the difficult classifications required once the limited standards of the original act were expanded. The lessons of this experience pervade the history of the 1940 and 1948 acts.

2. *The Selective Training and Service Act of 1940.*—With only minor differences not here pertinent,[11] the treatment of registrants who claim conscientious objection to war is the same under the Selective Service Act of 1948 as it was under the Selective Training and Service Act of 1940, § 5

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[11] The 1948 act, unlike its predecessor, specified that the conscientious objections must rest on belief in a Supreme Being and not on "essentially political, sociological, or philospohical views or a merely personal moral code." In addition, the 1948 act failed to provide for work of national importance under civilian direction for those persons unable to serve even as noncombatants, and instead deferred such persons. The 1951 amendments, 65 Stat. 75, modified this aspect of the 1948 Act along the lines of its predecessor.

(g), 54 Stat. 885, 889. In particular, the provisions authorizing inquiry and hearing by the Department of Justice are identical in the two statutes. The legislative history of the current provisions thus begins with the Burke-Wadsworth bill (S. 4164, H. R. 10132, 76th Cong., 3d Sess.), presented to Congress in June, 1940.

Section 7(d) of the original version was substantially equivalent to the World War I provision, and merely exempted members of well-recognized religious sects opposed to participation in war from combatant training or service. Such persons were to establish the sincerity of their belief under regulations prescribed by the President, but nothing was specified as to any appeal or hearing.[12] Numerous proposals recommending liberalization of this provision were presented before the House and Senate Military Affairs Committees in hearings held during July and August, 1940. Objection was raised to the bill's recognized peace church qualification, to its failure to recognize degrees of objection in requiring noncombatant service of all objectors, and to the complete control over conscientious objectors vested in the military.

Dr. Howard K. Beale, appearing for the American Civil Liberties Union before the Senate committee, proposed the British National Service Act of 1939 as a model to be followed in modifying Sec-

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[12] See Hearings before Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., p. 3; Hearings before House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess., p. 3.

tion 7(d).[13] Hearings before the Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., p. 309 *et seq.* In particular, he commented upon the fact that under the British system one claiming conscientious objection could be placed in the army only "after a fair hearing before a civil tribunal * * *." *Ibid.* See also testimony of Mr. Harold Evans, *ibid.*, at p. 164. Subsequently (on July 25) before the House Committee, Dr. Beale presented a substitute for § 7(d) proposing provisional registration of conscientious objectors and the establishment in the Department of Justice of a Bureau of Conscientious Objectors under the direction of a civilian commissioner. The Bureau was to establish civilian boards of inquiry in each state which were to examine objectors as to the sincerity of their beliefs, and assign those found to be sincere to noncombatant service or to work of national importance, or grant them complete exemption. The Bureau was also to establish a National Civilian Board of Appeal. Hearings be-

[13] The development of the conscientious objector provisions for World War II has been described as consisting largely of an effort by those concerned to obtain provisions as much like those of the British National Service Act as possible. Sibley and Jacob, *Conscription of Conscience*, p. 47 (1952). That Act, 2 and 3 Geo. 6, Ch. 81, § 5, provided that one claiming conscientious objection could upon timely application be provisionally registered on a Register of Conscientious Objectors, that subsequently he could apply to his local tribunal for conditional registration, indicating at that time the degree of his objection (that is, whether he was opposed to registration, to military service, or merely to combatant duties), and that if he felt himself aggrieved by the local board's action in his case he could appeal to a civilian appellate tribunal whose decision would be final.

fore the House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess., p. 191. This proposal for separate consideration of conscientious objectors outside of the ordinary channels of Selective Service, with special appeal procedures, was not adopted. The essentials of the provision ultimately substituted for the original Section 7(d) are found in the testimony of Mr. Paul C. French, appearing before the House Committee on behalf of the Friends. Speaking of this proposal, Mr. French said (*ibid.*, at pp. 201-202):

> * * * It provides, in general, for a registry of persons who claim conscientious objection to war at the time they are registered under the draft on a provisional register. * * *
>
> *It provides that the Department of Justice would see the record of every person who registered as a conscientious objector and would then hold a hearing and inquiry * * * and then report their findings back to the local draft board, whether the person was a conscientious objector and should justly be treated as such. * * **
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> * * * * *if they found his objections were not deep conscientious convictions, then his name would be removed from the provisional register of conscientious objectors, and he would be assigned to military service.*

This proposal also provided for nonmilitary work of national importance for those opposed to noncombatant service. For this reason, and because exemption was not limited to members of the recognized peace churches, the problem of

appraising sincerity became acute, as it had been under similar circumstances in the latter phases of World War I. The italicized portion above clearly indicates that the purpose of inquiry and hearing by the Department of Justice was primarily to meet this problem. The proposal represented three gains for the representatives of conscientious objection: (1) civilian work for those opposed to noncombatant service; (2) provisional registration after the British model, thereby keeping persons claiming exemption out of military control, at least until after their sincerity had been evaluated; and (3) a corollary of this, investigation and classification by a civilian agency, rather than by the War Department.

There is no mention in the legislative history of specific rights to be accorded the registrant at the Department of Justice hearing. It is probable that this was not considered since the hearing was regarded primarily as a step in an investigatory process leading to a recommended classification, rather than as a hearing in the sense of a trial. As a stage in the investigatory process, the hearing was to supplement the inquiry conducted earlier, and on the basis of data and impressions gathered through the entire investigation, the Department was to formulate its conclusion as to sincerity. The value of personal interview and interrogation had been demonstrated by the success of the World War I board of inquiry, which as its name suggests, was more an investigating than an adjudicating body. That no fundamental or substantial

change from the late World War I situation was intended to follow from transfer of the hearing function to the Department of Justice, is confirmed by the testimony of Mr. Raymond Wilson, of the Society of Friends (*ibid.*, at pp. 209-210):

> Mr. Martin. You are asking in this third section of your suggestion that the examination or investigation be conducted under civilian branches of the Government, but you are not asking for elimination of that examination?
>
> Mr. Wilson. No, we feel that it is perfectly right and proper that a hearing should be held.
>
> Mr. Martin. And the general principles you are advocating as principles to stand on are the same ones that were recognized during the World War—it is a question of administration of them?
>
> Mr. Wilson. Except that the administration in the War Department in the last war was not worked out until after a year or more after we got in the war. * * *

The substitute provision, which had been worked out in conjunction with Colonel O'Kelliher of the Army-Navy Committee on Selective Service,[14] be-

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[14] It read as follows:

Strike out section 7(d) and substitute the following:

"Nothing contained in this Act shall be construed to require any person to be subject to combat training or service in the land or naval forces of the United States who, by *reason of religious training* and belief, is conscientiously opposed to participation in war in any form, and is so found to be a bona fide objector as hereinafter provided: All persons claiming such conscientious objections shall be listed on a register of conscientious objectors at the time of their classification

came the working draft in both the House and Senate. *Selective Service System Monograph No. 11, Conscientious Objection*, p. 79 (1950). With some minor changes in phraseology,[15] it was reported out by the Senate Committee, S. Rep. 2002, 76th Cong., 2d Sess., p. 3. On August 28, 1940, the Senate passed the provision as reported. 86 Cong. Rec. 11142.

The provision reported out by the House Committee on August 29, was identical to that adopted by the Senate. H. Rep. 2903, 76th Cong., 2d Sess., p. 5. However, on August 30, Attorney General Jackson wrote to the Chairman of the House Com-

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by a local board, and persons so registered shall be at once referred to the Department of Justice for inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing shall be held by the Department of Justice regarding the character and good faith of the objection. The Department shall, after hearing, if the objection be sustained, recommend that the objector shall (1) be assigned to noncombatant service in such capacity as the President may designate as noncombatant, or (2) if found to be a conscientious objector opposed to participation in war in any form, that he shall be assigned to work of national importance under civilian direction, or (3) if said objection is not sustained, the local board shall be immediately notified thereof, and the name of such objector shall then be removed from the register of conscientious objectors, and such objector shall thereafter be subject to classification.

"Should such conscientious objector or the local board disagree with the findings of the Department of Justice, said local board shall immediately refer said case to the appeal board having jurisdiction for final determination."
Hearings before the House Committee, *supra*, p. 211.

[15] Among the changes was a provision requiring that notice of the time and place of the hearing be given to the objector, and another requiring the board or the objector to give notice to the other of disagreement with the Department's findings prior to the appeal. Committee Print No. 6, Selective Service System Monograph No. 11, Conscientious Objection, pp. 81-82 (1950).

mittee on Military Affairs advising him that he did not consider the duty vested in the Department by the bill a suitable one for the Department to perform, and calling attention to the possibility of leaving the classification of conscientious objectors entirely to the local boards. Whether because of this letter or for some other reason, such an amendment was made, and in the version adopted in the House there was no provision for inquiry and hearing by the Department of Justice. 86 Cong. Rec. 11689, 11753-11754.

In conference, a compromise was evolved to provide that the Department of Justice would be consulted only in the event that the objections were not sustained by the local board. Thus, the investigatory facilities of the Department would be utilized in only the more difficult cases. The Department's recommendation was, at the same time, explicitly made purely advisory. This change reemphasizes the fact that the Department's function was intended to be investigative-advisory, rather than adjudicative, which fact, in turn, presumably accounts for the failure to specify procedural rights (other than notice) or to confer subpoena powers on the hearing officer.[16] The Conference

[16] The substance of the Conference agreement is set out in H. Rep. 2937, 76th Cong., 3d Sess., p. 18: "Under the conference agreement, if the objections are not sustained by the local board in the first instance, the objector is given the right to appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the

Report was agreed to by both houses on September 14, 1940, 86 Cong. Rec. 12161, 12211.

3. *The Selective Service Act of 1948.*—The procedural aspects of the 1940 conscientious objector provisions were embodied without change in Section 6(j) of the bills which eventually became the Selective Service Act of 1948. (H.R. 6401, S. 2655, 80th Cong., 2d Sess.) In its report on the bill, the Senate Committee on Armed Services stated that "[e]laborate provision is made for determining claims to exemption on this ground * * *", and remarked that "[t]he exemption is viewed as a privilege." S. Rep 1268, 80th Cong., 2d Sess., p. 14. Little else was said concerning conscientious objectors either in the committee reports or at hearings which were held in the spring of 1948.

On the floor of the Senate, however, Senator Morse introduced an amendment to S. 2655 which, if enacted, would have established a separate civilian commission for classifying and otherwise handling conscientious objectors. Inquiry and hear-

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objections. If the department finds the objections to be sustained it is to recommend to the appeal board (1) that the objector, if he is inducted under the Act, be assigned to non-combatant service as defined by the President, or (2) if it is found that he is conscientiously opposed to participation in such non-combatant service, in lieu of such induction that he be assigned to work of national importance under civilian direction. In making its decision, the appeal board is to consider the record on appeal from the local board, together with the recommendations, which it is not bound to follow, by the Department of Justice. All persons whose claims for exemption under this provision because of conscientious objection are sustained are to be listed by the local board on a Register of Conscientious Objectors.

ing by the Department of Justice would have been eliminated. 94 Cong. Rec. 7278. The proposal was modeled after the British and Canadian systems, and is reminiscent of the schemes proposed and rejected in 1940. A principal justification for the amendment was that it "recognize[d] the right of conscientious objectors to a fair hearing and a determination of their claims and assignment by nonmilitary personnel.". 94 Cong. Rec. 7279. Throughout his argument in support of the amendment, Senator Morse stressed the fact that under the World War II practice the controlling determinations were made by the draft boards, implying thereby that reference to the Department of Justice did not provide a true hearing.

Opposing this change, Senator Gurney, Chairman of the Committee on Armed Services, insisted that the Committee was familiar with the appeal procedure under the 1940 Act, and that this procedure had worked satisfactorily and should be continued. He said (94 Cong. Rec. 7305, 7306):

> Our committee believes that the way the conscientious objectors were taken care of during the war worked out very well, generally, with the full approval of the country. The bill which is now pending follows the 1940 act, with very few technical amendments * * *.
>
> * * * * *
>
> The * * * amendment in this proposal * * * does not seem to do anything really constructive for the conscientious objectors. Hereto-

> fore, the Department of Justice has investigated appeals which the objectors make from the local boards. The amendment places the duty upon the newly created commission. What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. A new commission for that purpose is not necessary.
>
> The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases

The amendment was rejected. 94 Cong. Rec. 7307.

While neither Senator Morse nor Senator Gurney specifically mentioned the question of disclosure of the F.B.I.'s confidential investigative reports, the defeat of the amendment is nonetheless significant. The debate brought into focus the entire question of the kind of appeal to be given to persons claiming exemption as conscientious objectors. The rejection of the amendment indicates an intent to confine appeal to the ordinary channels of Selective Service, with, as Senator Gurney characterized it, fact-finding assistance from the Department of Justice of the type which it had provided under the 1940 statute.

4. *Conclusions Suggested by the Legislative History.*—While nothing in the legislative history directly relates to the question of whether the investigative reports should be shown to the registrant, it does establish certain facts which, we think, justify the conclusion that the registrant is not entitled to examine such reports.

(a) Experience in World War I had shown that a personal interview with an applicant by experienced lawyers was in itself a great aid in determining sincerity. The provision in the 1940 Act for "hearing" in addition to "inquiry" by the Department was undoubtedly a reflection of that experience, and was designed to assure the applicant an opportunity to express his views before a person not subject to local pressures and possible local prejudices.

(b) The fact that the inquiry and hearing are together the basis for a purely advisory opinion shows that the "hearing" was regarded as essentially part of the general "inquiry." It is clear that "hearing" was not used in the sense of a formal hearing with taking of testimony before a quasi-judicial administrative body with power to decide the registrant's claim. This is reinforced by the fact that no subpoena power is conferred upon the hearing officer and the Department, and by the rejection both in 1940 and 1948 of proposals for the establishment of special appeal tribunals. As noted above, provision for the hearing seems to have been inserted primarily for the purpose of giving the registrant an opportunity by his state-

ments and demeanor to demonstrate his sincerity.

(c) At any rate, nothing in the legislative history shows or implies any Congressional intent to make available the investigative reports. Moreover, as the Court of Appeals for the Ninth Circuit stated in *Elder* v. *United States*, decided February 24, 1953, "the court will not assume that Congress intended these investigative reports to be made public", because "the court cannot assume that Congress was unaware of this departmental policy"—referring to Department of Justice Order No. 3229, the validity of which was upheld in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, and particularly to the provision of the Order that "under no circumstances should the name of any confidential informant be divulged."

B. *The reenactment without change in 1948 and 1951 of the inquiry and hearing provision of the 1940 Act must be regarded as a ratification of the challenged procedure.*

Between 1940 and the present time, the Department of Justice has made recommendations in thousands of conscientious objector cases after inquiry and hearing identical with those held in these cases. We have not discovered that those aspects of the hearing procedure condemned by the court below were ever specifically called to the attention of Congress in connection with the 1948 and 1951 enactments. However, the procedure was not a secret. The peace churches and other organizations concerned with conscientious objector problems

could not have been unaware of the procedure by which the Department formulated recommendations upon the claims of thousands of their members. Indeed, each registrant was informed of the procedure by the *Instructions* furnished to him. The practice of not disclosing the investigatory report to registrants was described and criticized as early as 1943 in Cornell, *The Conscientious Objector and the Law*, pp. 26-27. See also Sibley & Jacob, *Conscription of Conscience* (1952) pp. 72-73. Under these circumstances, the lack of complaints to Congress must represent at least acquiescence in the Department's interpretation of the Act on the part of interested individuals and groups.

Moreover, in 1944 the contention was made before the Court of Appeals for the Second Circuit that denial of access to the F.B.I.'s investigative reports invalidated the classification of one claiming exemption as a conscientious objector. *United States ex rel. Brandon* v. *Downer*, 139 F. 2d 761 (C.A. 2). After examining the statute and the practice followed thereunder, Judge Frank, who wrote the opinion below in *Nugent*, concluded (139 F. 2d at 765):

> * * * It was * * * proper for the Department of Justice, through the F.B.I., to make an inquiry and proper that the hearing officer should consider the results of such inquiry; moreover, the Hearing Officer's report disclosed that there was nothing unfavorable in the F.B.I.'s report other than the incident as to the eye-

examination which was fully disclosed to appellant. * * *

Although the hearing officer's report in the *Downer* case was favorable to the registrant; the above-quoted language nevertheless represents a judicial recognition and approval of the prior administrative construction, under which the actual reports were withheld and only a summary of the adverse information supplied.

It is apparent that the court below has changed its mind since the *Downer* case. Meanwhile, many thousands of cases have been processed in accordance with the procedure formerly accepted, and Congress has reenacted § 5(g) of the 1940 Act without any material change. This Court has said, "It is, doubtless, a rule that when judicial construction has been given to a statute, the reenactment of the statute is generally held to be in effect a legislative adoption of that construction." *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237. See *Shapiro* v. *United States*, 335 U.S. 1, 20. Even in the absence of a prior judicial construction, "when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature * * *." Mr. Justice Holmes in *Copper Queen Mining Co.* v. *Arizona Board*, 206 U.S. 474, 479. See also *United States* v. *G. Falk & Bro.*, 204 U.S. 143, 152; *Brewster* v. *Gage*, 280 U.S. 327, 337; *United States* v. *Dakota-Montana Oil Co.*, 288 U.S.

459, 466; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500; *Helvering* v. *Reynolds Co.*, 306 U.S. 110, 114-115. As note above, *supra*, pp. 50-51, when the provision here involved was reenacted in 1948, Senator Gurney, Chairman of the Senate Committee on the Armed Services, expressed strong approval of the handling of conscientious objector claims. In any event, irrespective of either prior judicial construction or legislative reenactment, this Court gives great weight to long-continued administrative construction of a statute. *Robertson* v. *Downing*, 127 U.S. 607; *United States* v. *Healey*, 160 U.S. 136; *United States* v. *Cerecedo Hermanos y Compania*, 209 U.S. 337.

While this doctrine should not be used to perpetuate a plainly erroneous interpretation, where, as here, the established construction is reasonable and has given rise to a settled course of conduct, it cautions against easy adoption of a novel construction. It is significant in this connection that, apart from the court below, the only courts of appeals to consider the validity of the current procedure have sustained it. Thus, in *Imboden* v. *United States*, 194 F. 2d 508 (C.A. 6), certiorari denied, 343 U.S. 957, where it was contended that nondisclosure of the F.B.I. reports violated constitutional due process, the court held that due process was met by merely giving a summary of the adverse information while withholding the identity of confidential informants. Implicit in this decision is a holding that the disputed practice had statutory sanction, for otherwise the constitutional question would not have been reached. In the only court of appeals

decisions since the decisions below in *Nugent* and *Packer*, the Court of Appeals for the Ninth Circuit held that the statute neither "requires [n]or contemplates the inclusion of the investigative report in the file." *Elder* v. *United States*, No. 13,405, decided February 24, 1953. The court, after reviewing the procedure followed in the classification of conscientious objectors, concluded: "If the agency inquiry * * * is to be productive of worthwhile results, it seems essential that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation to the contrary the court will not assume that Congress intended these investigative reports to be made public." The court flatly rejected the *Nugent* analysis.[17] The rationale of the *Elder* decision was followed by the District Court for the Northern District of Illinois in *United States* v. *Hein*, No. 52CR217, decided April 2, 1953.

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[17] With the exception of *United States* v. *Christiano*, Cr. No. 8644, decided November 17, 1952, which, being a Second Circuit case, followed *Nugent*, District Court decisions likewise have not gone so far as to hold that the statute calls for disclosure of the investigative reports. In *United States* v. *Oller* and *United States* v. *Donovan*, 107 F. Supp. 54 (D. Conn.), the two defendants were acquitted because the F.B.I. reports were withheld. The defect, however, was held to be constitutional rather than statutory, and was apparently predicated upon the failure of the Department to provide adequate summaries of adverse information on the basis of which the registrants might have brought forward other witnesses to the same facts to test their accuracy. The court explicitly agreed that withholding the reports was within the Department's statutory authority. To like effect is *United States* v. *Bouziden*, 108 F. Supp. 395 (W.D. Okla.), in which, similarly, no adequate summary of the unfavorable information had been supplied. While holding the hearing unfair for this reason, the court took pains to emphasize that it was not "holding

C. *The challenged procedure is both fair and effective in fulfilling its purpose and in determining the issues involved.*

The court below concluded, drawing from Judge Hinck's opinion in *United States* v. *Geyer,* 108 F. Supp. 70 (D. Conn.) that the only purpose of the hearing required by Section 6(j) "was to give the registrant opportunity to meet the contents of the [investigative] report" and that such report must be made a part of the record so as to enable the appeal board to evaluate the Department's recommendation. (No. 540, R. 61-62). To the contrary, the hearing afforded to registrants in these and thousands of other cases is effective in that it enables the Department to make informed recommendations to the appeal boards, and in that it enables registrants every opportunity to support their claims consistent with the Department's need for information from every available source.

The entire history of the treatment of conscientious objector claims in this country points to the conclusion that the principal purpose of the inquiry and hearing provisions of Section 6(j) is to give to registrants an opportunity to demonstrate the sincerity of their claims before a wholly civilian agency which will have an opportunity for oral interrogation and observation of the bearing and demeanor of registrants. This purpose is fully ac-

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that a registrant may compel a hearing officer to produce reports compiled during the Department of Justice inquiry." *(Ibid.,* at 399.)

complished by the hearings held in these and other cases.

Moreover, we submit that the procedure does enable the registrant to meet any information adverse to his claim which may be contained in the investigatory report. Each registrant receives with the notice of hearing a copy of the Instructions specifically informing him that

> Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence. [18]

If the adverse statements relate to specific acts or events which are provably false, disclosure to the

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[18] The form taken by a typical summary of unfavorable information was set out by the court in the *Imboden* case, *supra*, as follows (194 F. 2d at 510):

"A woman who states that she has been an active member of the Glenford Brethren Church for fifty years, * * *, recalls no one by the name of Imboden, * * *."

"An official of the Glenford Brethren Church states * * *.

"An official of the Olivet Church of the Brethren at Five Points for many years, states * * *.

"An official of Ashland College advises * * *.

"A supervising official of the Glenford Brethren Church since 1945, advises * * *.

"A former supervising official of the Glenford Brethren Church, who has been a minister in the church for fifty years, states * * *."

registrant that such allegations have been made provides him with an opportunity for refutation or explanation. If the adverse information tends to show an irreligious state of mind, such as the violation of every tenet of the particular denomination except that relating to military service, the disclosure of the nature of such allegations will enable the registrant to overcome them by his own demeanor before the hearing officer and by the testimony of persons close to him who have observed, and perhaps influenced, the religious development that produced his conscientious objection. The net result of the procedure is that the registrant is denied only the identity of the sources of information contained in the investigatory report.

The inquiry and hearing which the Department of Justice conducts is a step in the difficult task of evaluating the sincerity of registrants claiming exemption from military service as conscientious objectors. The Department believes that it will be hindered in formulating recommendations in these cases if it must disclose to each registrant the names of persons who furnished information or expressed opinions adverse to his claim and which are contained in the F. B. I. investigatory report which is furnished to the hearing officer. Inevitably, since the issue is the sincerity of religious beliefs, the information and opinion obtained from persons close to the registrant—friends, neighbors, teachers, etc.—are an important check upon the registrant's statements and those of his selected witnesses. These are the very informants who

would be markedly inhibited unless they are assured that their identities will not be disclosed. As the Court of Appeals for the Ninth Circuit stated in *Elder* v. *United States*, *supra*:

> In our opinion the disclosure thought in the *Nugent* case to be required by the terms of the Act would operate, not to further, but to defeat the objective of Congress. Its apparent purpose was to require a check of the genuineness and good faith of the registrant's claim through inquiry of persons acquainted with him, and thus to ascertain whether injustice might not have been done him by the refusal of the selective service board to recognize his alleged conscientious scruples. * * * If the agency inquiry following such referral is to be productive of worthwhile results it seems essential that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these investigative reports to be made public.

The situation involved in these cases is strikingly similar to that presented by pre-sentence investigations conducted for the purpose of determining appropriate sentences in individual cases. This Court, in *Williams* v. *New York*, 337 U. S. 241, held that the defendant had no right to confront or cross-examine witnesses who had given information in confidence in such an investigation. There,

as here, there was no constitutional right to a hearing, and the subject of inquiry is the character and personality of the offender. The court observed (337 U.S. at 250):

> We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

Since, as in the Williams case, the confidential presentence investigation may actually mean the difference between life and death,[19] it can scarcely be contended that the hearing involved here deals with interests of greater moment.

Government employment, loss of which may have most serious consequences, is, like exemption from military service on the basis of conscientious objection, a privilege rather than a right. Accordingly, dismissal therefrom on the basis of confidential information has been upheld. *Bailey* v. *Richardson*, 182 F. 2d 46 (C.A. D.C.), affirmed by an equally divided court, 341 U. S. 918. To Miss Bailey's contention that there could be no "evidence" as that term is understood in our jurisprudence without disclosure of the sources, the court answered that in this context it had a looser meaning, perhaps equivalent to "information." (182 F. 2d at 51.) Acknowledging that the features

[19] The jury had recommended life imprisonment; after considering information revealed by the pre-sentence investigation, the court imposed the death penalty.

complained of did not meet ordinary judicial standards, the court observed (*ibid.*), "But the question is not whether she had a trial. The question is whether she should have had one." The court concluded that to protect her status as a government employee she was not entitled to a judicial-type proceeding.

Similarly, the most summary of hearings has been held adequate in cases arising under the Federal Probation Act which provided that before probation might be revoked the probationer should be taken before the court. Act of March 4, 1925, c. 521, § 2, 43 Stat. 1259, 1260. In *Escoe* v. *Zerbst*, 295 U.S. 490, 493, this Court said that "This does not mean that he may insist upon a trial in any strict or formal sense. * * * It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. * * *" That discretion was found to have been abused in the *Escoe* case where no hearing whatsoever had been granted. On the other hand, in *Burns* v. *United States*, 287 U. S. 216, the petitioner complained that he had been denied permission to produce evidence in support of his testimony and that he had not received previous notice of the charges according to the established rules of judicial procedure. The court held that the hearing, though summary, was not improper or inadequate. *Ibid.*, at p. 223. Such procedural shortcuts were permitted because probation, like federal employment and exemption

from military service, is "conferred as a privilege and cannot be demanded as a right." *Ibid.*, at 220.

We submit that considering the matter involved—the privilege of exemption from military service, the advisory nature of the Department's recommendation, the hearing procedure challenged in the instant cases accords to registrants a full opportunity to establish the sincerity of their claims of conscientious objection while making available to the hearing officer and to the Department every source of information which will aid in the correct decision of these difficult subjective issues. It is clear that Congress, in requiring inquiry and hearing by the Department of Justice in these cases, never contemplated that the Department should so disclose the results of investigation as to deprive itself of sources of information necessary for making responsible recommendations. The results of the procedure have been extremely beneficial to conscientious objectors as a class. And, after 13 years of operation, Congress has given no indication that it intended to require a different procedure.

II

Disclosure of the Investigatory Reports to Registrants and Appeal Boards Is Not Required by Due Process of Law in a Hearing Under Section 6(j) Which Results Only in an Advisory Decision With Respect to a Privilege, and in which Registrants Can Obtain the Substance of Adverse Information Contained in Such Reports.

While the decision of the court below was based solely upon its interpretation of Section 6(j), we

assume that the respondents will contend (as respondent Nugent did in the court below) that the due process clause of the Fifth Amendment requires disclosure to registrants and to appeal boards of F. B. I. investigatory reports, including the names of sources of information, on conscientious objector claims. For reasons which have already been stated under Point I, we think it is clear that respondents have no constitutional right to have such investigatory reports disclosed to them or to the Selective Service appeal boards.

Exemption from military service as a conscientious objector, or for any other reason, is a privilege granted by Congress, not a constitutional right. *United States* v. *Macintosh*, 283 U. S. 605, 624. Having authorized exemptions for conscientious objectors, Congress was under no constitutional compulsion to provide for registrants claiming such privilege any appeal from a local board's denial of such claims, or for a hearing by the Department of Justice in connection with such an appeal. In providing for an appeal, as it has in Section 6(j), Congress is entirely free to provide an appeal or review procedure which it considers appropriate under the circumstances. *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542, 544.

Even if the due process clause of the Fifth Amendment is applicable to the conduct of the hearing required by Section 6(j), it would not compel the result reached by the court below. As stated above in Point I of this brief, *supra*, pp. 32-34, this Court has repeatedly recognized that the type

of hearing required by due process in a particular situation varies with the nature of the private and governmental interests involved, the reasons for employing a particular procedure, the safeguards afforded by that procedure, and the cost or loss resulting from the use of alternative procedures. The present situation is one in which the Department of Justice holds a hearing to determine whether it shall *recommend* that a registrant be granted the *privilege* of exemption from military service. From these circumstances alone it follows that due process requires much less here than in a criminal proceeding or in cases where rights are finally determined. *Norwegian Nitrogen Products Co.* v. *United States, supra.* In hearings under Section 6(j), the Department of Justice, from 1941 until now, has not disclosed F. B. I. investigatory reports, and particularly the names of informants, to either registrants or appeal boards, so as to obtain information from persons who are unwilling to have their identities disclosed. Registrants are in no way hindered from producing any information which they believe will establish the sincerity of their claims. They are enabled to rebut mistaken or malicious statements which may be in the investigatory report by their opportunity to be advised of the general character of material in the report which is adverse to their claims. Considering that information as to the sincerity of a registrant's claim is largely derived from those persons who are close to the registrant and is related to his religious development and daily life,

such disclosure is clearly sufficient to enable him to offer rebuttal or explanation on these matters with which he and his witnesses are more familiar than anyone else.

While the procedure challenged below is fair to the registrant, and has been extremely beneficial to conscientious objectors as a class (*supra*, p. 31), it also makes available to the Department much information which would be unavailable if the identity of the informants must be disclosed to registrants and appeal boards. The issue involved in these cases—the sincerity of claims of conscientious objection—is highly subjective and often difficult to determine. The Department and its hearing officers need every source of information which will assist in formulating useful recommendations on such claims. Where, as in this situation, there is no element of punishment of the individual involved or of depriving him of some vested right, due process of law permits use of information the sources of which are not disclosed to him. In *Williams* v. *New York*, 337 U. S. 241, 247, it was recognized that "Highly relevant—if not essential—to [the sentencing judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." Accordingly, this Court concluded "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-

examination." 337 U. S. at 250. Similarly, the Department of Justice and its hearing officers need the fullest information as to whether a registrant's daily life is consistent with his assertion of conscientious objections. As in the case of the presentencing investigation report involved in the *Williams* case, such information will often be unavailable if the names of informants are revealed. Weighing the protection afforded registrants by the Department's hearing procedure against the necessity for obtaining such information, we submit that the due process clause, if applicable, is satisfied.

CONCLUSION

It is therefore respectfully submitted that the judgments of the court below should be reversed.

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APRIL, 1953.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

HARRY GRAY NUGENT, Defendant-Appellant

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached exhibit was used on the argument of the above entitled case in this court.

[SEAL.] ALEXANDER M. BELL,
Clerk.

Dated: December 9, 1952.

GOVERNMENT'S EXHIBIT 2-J

U. S. v. NUGENT

In the Matter of HARRY GRAY NUGENT, *Conscientious Objector*

Hearing held July 26, 1951—Before Hearing Officer THOMAS O'ROURKE GALLAGHER, Esq., 188 Montague Street, Brooklyn, New York.

United States Attorney for the Eastern District of New York: Honorable FRANK J. PARKER.

HARRY GRAY NUGENT appearing before Mr. Thomas O'Rourke Gallagher, Hearing Officer, being duly sworn testified as follows:

Q. What is your address?

A. 1650 Ocean Parkway, Brooklyn 23, New York.

Q. Where were you born?

A. New York City.

Q. When?

A. 1899—August 5th.

Q. Are you a minister of the gospel?

A. Well, I am not an ordained minister by men, but I believe as the Master did to spread the truth to whom I have opportunity to minister.

Q. Do you claim that the Local Draft Board qualified you wrongly?

A. Well, I couldn't accept their classification. Perhaps in their point of view they felt they classified me correctly, but I can't accept it because I couldn't swear any allegiance to the armed forces. It would be in violation to my religious beliefs to do so. And, so I believe they classified me wrongly, not deliberately but nevertheless it is wrong in my eyes.

Q. What classification do you desire?

A. Well, when I wrote to the Draft Board, I told them 4E classification—the classification which would impose no military service in any way whatsoever.

Q. Do you belong to any religious organization?

A. I associate with a religious group, the Associated Bible Students. We are an organization, we are organized in dispensing the truths that we believe in, but we do not consider ourselves a part of an organization. We believe that God does not use any organization—of course we have to organize to accomplish something, but we believe we are the temple of the Living God, we the individual, not the building or anything.

Q. By that do you mean you do not need a build-

ing ordinarily called a church or any such edifice but the human body is the temple itself?

A. Well, we believe as the Scripture says "Wherever two or three are gathered in the Lord's name, he will be there also." We haven't met in homes altogether, we meet wherever it is convenient for us. We hire at the moment—we meet in a room downstairs in a church at 104 Clark Street.

Q. What is 104 Clark Street?

A. We rent, we use the meeting room for Sundays downstairs. 104 Clark Street is the Swedenborgen Church. We are not connected with that in any way except we rent space from them.

Q. Is that in connection with the Jehovah Witnesses?

A. No connection.

Q. Are your parents alive?

A. Yes, they are.

Q. Is that Mr. H. A. Nugent and Mrs. B. Nugent.

A. Yes.

Q. What is the B for?

A. Beatrice.

Q. Do you live with H. A. Nugent at 1650 Ocean Parkway?

A. Yes, I do.

Q. Is your father the superintendent of that building?

A. Yes sir.

Q. He and your mother are separated, is that correct?

A. No, they are living together.

Q. You gave the address of 535 Second Street, Anderson, Kentucky, for your mother on your special form, form SS 150. Was she separated from your father at that time? What was the condition?

A. The condition wasn't a separation but the condition was that my mother was not in good health and had gone through quite an ordeal emotionally in my father's heart attack and she went away for a rest. She went away to Kentucky; it was only a vacation—not a separation. But, she was there quite some time so I gave that address.

Q. What was their religion originally?

A. Well, my father's parents, I believe, they were of the Catholic faith originally and that my father's mother, that is, my grandmother came into our religion and then on my mother's side she was raised in the religion I believe. She and her mother and her grandfather also was a minister of my religion, the religion I embrace.

Q. What do you call your religion?

A. Well, there isn't any name—we are just Bible students that associate together.

Q. Were you baptized a Catholic?

A. No, I was not.

Q. Were you brought up as a Catholic?

A. No.

Q. Did you ever go to a Catholic—Parochial School?

A. No.

Q. Or a Catholic Church?

A. No. My father believes, he embraced the belief that I embrace long before I was born.

Q. What did your father believe?

A. He was associated with the Associated Bible Students, the same group, those of the same group before I was born.

Q. When did you first start to study the Bible at any place?

A. Well, of course I always heard——

Q. No, please answer the question.

A. When I was 16 years old.

Q. Is it a fact that the Associated Bible Students of which you say you are a member, study jointly and individually the bible and have the absolute point of view to form their own conclusions as a result of their study of the bible?

A. Yes, they have that.

Q. And you have come to the conclusion that it would be wrong to bear arms against any person?

A. Yes, I have.

Q. Last year on August 5th, you were 21 years old?

A. That is correct.

Q. Did you vote in the general election last year?

A. No, I did not vote.

Q. Did you register?

A. No, I didn't register.

Q. According to your religious beliefs, do you intend to register?

A. No, I don't intend to register?

Q. Do you intend to take part in any manner with the government we have, the form of government or the maintenance of it in the United States of America?

A. I don't intend to take part in it inasmuch as where I feel it conflicts with the rule of God.

Q. Would you be willing to do manual labor for the benefit of the government provided that you did not have to bear arms?

A. I would be willing to do manual labor provided I didn't have to swear to any oath of allegiance to contribute to the defense of any aggressive

action of the government. I do not wish to try to uphold neither do I wish to bear down. I feel I am rather, well I feel I am rather separated as a spectator or bystander.

Q. If you were called upon to do so in an assemblage or individually, would you salute the flag of the United States?

A. I would not salute the flag of the United States—I would like to clarify my statement.

Q. No, that is all right. How far did you go in school?

A. I went to the third term in high school.

Q. What high school?

A. High school of industrial art.

Q. Did they teach English and reading and writing?

A. They did.

Q. They did?

A. We had English, reading and writing and we had our subjects in commercial art also.

Q. Do you do any manual labor around the apartment where your father is superintendent?

A. Yes, I do.

Q. What for instance?

A. Well, last week I cleaned out the inside of the oil burner, the furnace, and where I feel * * * my father's health—he has had a heart condition, and where I feel his heart in danger, I will help him.

Q. Did you ever tell any of your friends or any of your neighbors about your beliefs with reference to this religion of yours?

A. I believe it is my duty to tell my belief——

Q. Wait a minute, just answer the question.

A. Yes.

Q. Whom?

A. Mr. William Nichols at 678 East 24th Street where I lived, near my former address. Mr. Irving Levitt, 120 Commonwealth Place in the building where I live. Mr. Sam Mandelbaum, 678 Clermont Road. It is hard to enumerate them, I speak to many people.

Q. * * * Was that recently.

A. Well, I constantly speak of my religion.

Q. Are they members of your organization?

A. The gentlemen I just cited?

Q. Yes.

A. They are not.

Q. Mr. Nichols is in the Army, isn't he.

A. That is correct.

Q. I assume he is not a Conscientious Objector, is that right?

A. No, he isn't.

Q. Would you be willing to drive an ambulance in Korea if you didn't have to swear allegiance to the flag?

A. No,—yes,—no.——

Q. Yes or no please?

A. No.

Q. Would you be willing to work in the medical corps if you didn't have to swear allegiance, going in as a civilian, but in the combat area?

A. Yes or no?

Q. That is right.

A. No.

Mr. GALLAGHER: That is all. You will be notified.

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